89-1759

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1989

A. L. Lockhart, Director,
Arkansas Department of Correction — PETITIONER

V.

William Lloyd Hill — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Is advice concerning parole eligibility a direct rather than a collateral consequence of a guilty plea?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A.L. Lockhart, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the En Banc Court of Appeals issued after granting Lockhart's petition for rehearing en banc is reported as *Lockhart v. Hill*, 894 F.2d 1009 (8th Cir. 1990) (En Banc). A copy of the opinion is reprinted in slip opinion form in Appendix A to this petition.

The opinion of the panel of the Court of Appeals is reported as *Lockhart v. Hill*, 877 F.2d 698 (8th Cir. 1989). A copy of the opinion is reprinted in slip opinion form in Appendix B to this petition.

The Judgment and Order of the District Court are unreported. They are reprinted in Appendix C to this petition.

The Amended Recommended Findings of Fact and Conclusions of Law issued by the Magistrate are unreported. They are reprinted in Appendix D to this petition.

JURISDICTION

The final judgment of the En Banc Court of Appeals was entered on January 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The respondent, William Lloyd Hill, was charged on November 3, 1978, with first degree murder and theft of property in connection with a theft in excess of $100.00 from and the murder of Darrel Pitts. It was alleged that the crimes were committed on October 1, 1978. On April 6, 1979, Hill entered a negotiated plea of guilty. The plea was accepted by the trial court and Hill was sentenced to thirty-five (35) years imprisonment for first degree murder and to ten (10) years imprisonment for theft of property. The sentences were ordered to be served concurrently for a total thirty-five (35) year sentence.

Rule 36.1 of the Arkansas Rules of Criminal Procedure provides that a criminal defendant may not appeal from a conviction entered upon a plea of guilty. Therefore, Hill had no appeal from his conviction. However, he filed a petition for post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. On October 21, 1980, Hill's Rule 37 petition was denied by the Circuit Court of Pulaski County. He did not appeal to the Arkansas Supreme Court from the circuit court's denial of Rule 37 relief.

On June 30, 1981, Hill filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. *Hill v. Lockhart*, No. PB-C-81-217. On February 28, 1983, the Honorable G. Thomas Eisele filed a Memorandum and Order dismissing the petition and denying the relief sought.

Hill appealed from the denial of habeas corpus relief to the Eighth Circuit Court of Appeals. A divided panel of the Court affirmed the District Court's denial of habeas relief. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). On rehearing, the En Banc Court of Appeals affirmed the judgment of the District Court by an equally divided court. *Hill v. Lockhart*, 764 F.2d 1279 (8th Cir. 1985).

Hill then filed a petition for a writ of certiorari in the United States Supreme Court. Certiorari was granted on March 18, 1985, and on November 18, 1985, this Court affirmed the judgment of the Eighth Circuit Court of Appeals. *Hill v. Lockhart*, 474 U.S. 52 (1985).

Then on January 15, 1986, Hill filed his second habeas corpus petition, the petition now at issue. It is undisputed that the two grounds for relief raised in the second petition are identical to grounds that had been raised in the first habeas corpus petition. When this Court reviewed Hill's first habeas petition, it noted that he "did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis whether or not to plead guilty." *Hill*, 474 U.S. 52, 60 (1985). In his second petition, Hill sought to cure the defect pointed out by this Court.

After Hill filed his second petition, the District Court denied a motion to dismiss the petition as a successive petition pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts and pursuant to 28 U.S.C. § 2244(b).

After the motion to dismiss was denied and an answer was filed, an evidentiary hearing was held on May 22, 1987, before the Honorable John F. Forster, United States Magistrate. The Magistrate first recommended denial of habeas corpus relief. However, the District Court rejected this recommendation and referred the case back go the Magistrate. Upon further consideration, the Magistrate recommended that habeas corpus relief be granted. On July 20, 1988, the District Court adopted the Magistrate's Amended Recommended Findings of Fact and Conclusions of Law and ordered that the writ of habeas corpus issue if the State of Arkansas did not try Hill on the charges of murder and theft within ninety (90) days.

The Eighth Circuit stayed the District Court's judgment pending an appeal.

Lockhart appealed the District Court's judgment granting habeas corpus relief to the Eighth Circuit Court of Appeals. A divided panel of the Eighth Circuit affirmed the District Court's grant of habeas corpus relief. *Lockhart v. Hill*, 877 F.2d 698 (1989). Lockhart then filed a petition for rehearing and rehearing en banc. The Eighth Circuit granted the petition for rehearing en banc and by five to four vote affirmed the District Court's judgment and the result reached by the panel. *Lockhart v. Hill*, 894 F.2d 1009 (8th Cir. 1990) (En Banc).

The Eighth Circuit has stayed the issuance of its mandate during the pendency of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

William Lloyd Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court in Little Rock, Arkansas in 1978. In 1979, Hill through counsel negotiated a plea to both charges. He received a sentence of 35 years on the first degree murder charge and a concurrent sentence of ten years on the theft of property charge.

In effect at the time of Hill's guilty pleas was a state law governing potential parole eligibility requiring service of a longer term for second offenders before they could become eligible for parole. *See* Ark. Stat. Ann. §§ 43-2828(2) and 43-2829(3) [now codified as Ark. Code Ann. §§ 16-93-603(2) and 16-93-604(3)]. Hill was a second offender under that statute and was not eligible for parole until having served one-half of his sentence with credit for good time. [1] Hill contends that his attorney advised him prior to the entry of his guilty pleas that he would be eligible for parole after serving one-third of his sentence with credit for good time.

When this Court previously reviewed this case, it noted that:

> We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in federal courts.

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1 Hill was paroled from the Arkansas Department of Correction on February 13, 1989.

Hill v. Lockhart, 474 U.S. 52, 56 (1985).

Upon review of a second habeas corpus petition filed in the District Court after this Court affirmed the denial of habeas corpus relief in his first habeas proceeding, the District Court granted habeas corpus relief. The only difference between the two petitions was that in the second petition, Hill cured the defect identified by this Court and claimed that but for his attorney's erroneous advice, he would have pleaded not guilty and would have insisted on going to trial. This time, the District Court granted an evidentiary hearing.

At the evidentiary hearing Hill testified that his attorney had been aware of his prior conviction and that his attorney nevertheless advised him that he would be *eligible* for parole after serving six (6) years of the thirty-five (35) year sentence offered in the plea bargain by the State. Hill's allegation is that the six years was calculated based on his being eligible for parole after serving one-third (⅓) of his sentence with credit for good time which would reduce his sentence further and could result in his being released on parole after serving one-sixth (1/6) of his sentence or in approximately six (6) years.

Lockhart acknowledges that if counsel had been aware of Hill's prior conviction and still advised him that he would be eligible for parole after serving approximately six (6) years, this advice would have been erroneous under Arkansas law. Ark. Stat. Ann. § 43-2829(3) [now codified as Ark. Code Ann. § 16-93-604(3)] provides that second offenders, the classification in which Hill belonged because of his prior conviction in Florida, shall not be eligible for release on parole until a minimum of one-half (½) of their sentence shall have been served, with credit for good-time allowances.

However, even if Hill's attorney incorrectly advised him with respect to his parole eligibility date, Lockhart

asserts that he is still not entitled to habeas corpus relief. When the Eighth Circuit addressed this issue in Hill's first appeal, *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984), it affirmed the District Court's denial of Hill's habeas corpus petition without an evidentiary hearing. *Id.* 731 F.2d at 572-73. In doing so, the Court assumed for purposes of analysis, that Hill's attorney had misadvised him with respect to his parole eligibility. Even with that assumption, the Eighth Circuit affirmed the District Court's denial of habeas corpus relief. The Court noted:

> Counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea.

Hill, 731 F.2d at 572.

The Eighth Circuit, upon consideration of the appeal involving Hill's second habeas corpus petition, affirmed the District Court's grant of habeas corpus relief. The Eighth Circuit reasoned:

> In some situations incorrect advice about parole will be merely a collateral matter, not significant enough to justify habeas relief. A lawyer's incorrect guess as to the actual time of parole, for example, would probably fall into that category. But here the misadvise was of a solid nature, directly affecting Hill's decision to plead guilty. Hill's lawyer had died by the time of the evidentiary hearing in the District Court, thus making it easier for someone to fabricate what the lawyer said, but the District Court believed Hill, and we cannot say that this determination of credibility was clearly erroneous.

Lockhart v. Hill, 894 F.2d 1009, 1010 (8th Cir. 1990) (En Banc). Thus, the Eighth Circuit has suggested that advice about parole is in some circumstances a direct consequence of a guilty plea.

Lockhart asserts that the position taken by the Eighth Circuit has resulted in the interpretation of an important question of federal law which has not been but should be settled by this Court and further that the Eighth Circuit has taken a position in its holding in this case which is in conflict with the decisions of other federal and state courts. That question is whether misadvice concerning parole eligibility can ever invalidate a guilty plea which is otherwise properly made. Lockhart asserts that the issue of parole is a collateral matter and cannot invalidate an otherwise valid guilty plea.

This exact question, in the context of whether Hill was entitled to an evidentiary hearing upon making a claim that he had been misadvised about parole, was the issue upon which this Court granted certiorari in this case when it last came before the Court. However, based upon its finding that Hill had failed to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), this Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). It is now appropriate for this Court to answer that question.

In reaching its conclusion in Hill's case, the Eighth Circuit has now aligned itself with the Fourth Circuit in holding that gross misadvice about parole eligibility may invalidate a guilty plea. *See O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983); *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979).

However, other federal circuits have addressed this issue and have concluded that parole is a collateral matter to a guilty plea and misadvice concerning parole does not invalidate a guilty plea. *See Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983); *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980); *Trujillo v. United States*, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967).

In addition to being in conflict with other federal circuits, the Eighth Circuit's most recent holding in Hill's case is in direct conflict with its own prior authority on this issue. The panel that originally heard this case found that the details of parole eligibility were considered collateral rather than direct consequences of a guilty plea. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir.), *aff'd.*, 764 F.2d 1279 (8th Cir. 1984). The Eighth Circuit apparently did not feel constrained by its previous holding in Hill's case because this Court granted certiorari and made its ruling on a narrower ground than the Eighth Circuit had. *Lockhart v. Hill*, 877 F.2d 698, 701, 702 (8th Cir. 1989).

Hill's second habeas petition asserted two grounds for relief. He challenged the voluntariness of his plea and alleged a denial of effective assistance of counsel. The two grounds really assert a single claim for relief under this Court's analysis in *Hill v. Lockhart*, *supra*. This Court made it clear that where a defendant pleads guilty upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *Id.*, 474 U.S. at 56. Thus, the issue is whether counsel's advice to Hill amounted to ineffective assistance of counsel.

Thus, in order to prevail on his claim of ineffective assistance of counsel, Hill had to establish that he was prejudiced as a result of his attorney's deficient performance. *Hill*, 474 U.S. at 57. To establish prejudice, Hill was required to show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

Lockhart asserts that Hill failed to establish that there is a reasonable probability that, but for counsel's alleged inaccurate advice, he would have insisted on going to trial. The difference between the advice that Hill claims that his attorney gave him concerning his parole eligibility and what

in reality he was required to serve before becoming eligible for parole is the difference between approximately 6 years and approximately 9 years.

If Hill had gone to trial, he faced a possible sentence of five to fifty years or life imprisonment. Hill claims that if he had known that he had to serve 9 years before becoming parole eligible instead of 6 years, he would have insisted on going to trial. Lockhart asserts that the 3-year difference does not establish a *reasonable* probability that Hill would have insisted on going to trial when balanced against a possible 50-year or life sentence that he could have received if he had gone to trial.

It is evident that the plea bargain of 35 years was in Hill's best interest. It is not reasonable to believe that the difference between 6 and 9 years incarceration before becoming parole eligible would have caused Hill to reject the plea bargain when he faced a possible 50-year or life sentence [2] if he had gone to trial. This is especially true when one realizes that the issue is reviewed "objectively, without regard for the 'idiosyncrasies of the particular decision maker.'" *Hill v. Lockhart*, 474 U.S. at 59-60, *quoting Strickland v. Washington*, 466 U.S. 668, 695 (1984).

The dissenters at the Eighth Circuit agreed and explained as follows:

> I respectfully dissent. The Court's holding that an admitted killer's first degree murder conviction must be set aside on his say-so that his now-deceased attorney's advice concerning parole eligibility misled him into accepting a plea bargain—one that clearly appears to have been in his best interests—is

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Under Ark. Code Ann. § 16-93-604(b)(1) (1987), if Hill had received a life sentence, he would not have been eligible for release on parole unless the sentence was commuted to a term of years by executive clemency.

not required by the Constitution or by any decision of the United States Supreme Court. Today's holding forgoes objective analysis of Hill's options at the time of his plea bargaining in favor of slippery subjectivity. It opens the door to what may prove to be a flood of similar habeas claims. It represents a step I am not prepared to take.

* * *

I believe our original panel decision was correct in holding that Hill's claim lacks constitutional footing. First, I seriously doubt that the Sixth Amendment ever can be brought into play by allegations of incorrect advice concerning parole eligibility. The subject of parole eligibility, though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely, the obtaining of either reduced charges, a below-the-maximum sentence, or both. Moreover, even indulging the assumption, without deciding, that a case might be found in which counsel's advice concerning parole eligibility is so far off the mark that the Sixth Amendment right to the effective assistance of competent counsel is violated, in my judgment this is not such a case. The advice given by Hill's counsel certainly was not "gross[] misinform[ation]" on the order of that found in *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (counsel misrepresented parole eligibility of eight and three-quarter years as only one and three-quarters years). For the reasons well-explicated in our 1984 panel opinion, which I will not here restate, I would find no constitutional violation and therefore would reserve the judgment of the District Court.

Lockhart v. Hill, 894 F.2d at 1010, 1011 (Bowman, J., dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2237

William Lloyd Hill,	*
	*
Appellee,	*
	* On Appeal from the
v.	* United States District
	* Court for the Eastern
A.L. Lockhart, Director,	* District of Arkansas.
Arkansas Department of	*
Correction,	*
	*
Appellant.	*

Submitted: September 12, 1989

Filed: January 31, 1990

Before LAY, Chief Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, en banc.

ARNOLD, Circuit Judge.

William Lloyd Hill, a state prisoner serving a 35-year sentence, brings this petition for habeas corpus under 28

U.S.C. § 2254. The District Court [1] granted relief, ordering that Hill be released unless the State affords him a trial. A panel of this Court affirmed, and we then granted the State's petition for rehearing with suggestions for rehearing en banc, thus vacating the panel opinion.

We now affirm, adopting the reasoning contained in the panel decision. *Hill v. Lockhart*, 877 F.2d 698 (1989). The District Court did not abuse its discretion in hearing Hill's second habeas petition, because there had been no final determination on the merits of Hill's first petition. And the erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), rendering Hill's plea invalid and entitling him to a trial.

We are careful to note that not every instance of a lawyer's failure to inform a client accurately of parole eligibility will reach the level of a constitutional violation. As detailed in the panel opinion, in this case there is a reasonable probability that the result of the plea process would have been different but for the erroneous information:

> Not only had Hill explicitly asked his counsel about the parole system in Arkansas, Tr. 23, but he had made clear that the timing of eligibility was the dispositive issue for him in accepting or rejecting a plea bargain. He told his attorney that he considered it no bargain to forego a trial unless his eligibility would be sooner than seven years, which he understood to be the time he could serve with commutation of a life sentence. Tr. 24-26. The Plea Statement bears the signature of Hill's counsel, immediately below the words: "His plea of guilty is consistent with the facts he has related to me and

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1 The Honorable Garnett Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

> with my own investigation of the case." J.A. 57. Given the attorney's knowledge of his client's particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in *Strickland.*

877 F.2d at 703.

In some situations incorrect advice about parole will be merely a collateral matter, not significant enough to justify habeas relief. A lawyer's incorrect guess as to the actual time of parole, for example, would probably fall into that category. But here the misadvice was of a solid nature, directly affecting Hill's decision to plead guilty. Hill's lawyer had died by the time of the evidentiary hearing in the District Court, thus making it easier for someone to fabricate what the lawyer said, but the District Court believed Hill, and we cannot say that this determination of credibility was clearly erroneous. For a situation with some similarity, *cf. Blair v. McCarthy,* 881 F.2d 602 (9th Cir. 1989) (defendant not told of mandatory parole term to follow sentence of probation; defendant would have pleaded not guilty had he been told; guilty plea set aside on habeas).

We sustain the result reached by the panel, and the judgment of the District Court is

Affirmed.

BOWMAN, Circuit Judge, joined by JOHN R. GIBSON, WOLLMAN, and MAGILL, Circuit Judges, dissenting.

I respectfully dissent. The Court's holding that an admitted killer's first degree murder conviction must be set aside on his say-so that his now-deceased attorney's advice concerning parole eligibility misled him into accepting a plea bargain—one that clearly appears to have been in his best interests—is not required by the Constitution or by any decision of the United States Supreme Court. Today's

holding foregoes objective analysis of Hill's options at the time of his plea bargaining in favor of slippery subjectivity. It opens the door to what may prove to be a flood of similar habeas claims. It represents a step I am not prepared to take.

Based on the facts as found by the District Court (which credited Hill's self-serving testimony), Hill's attorney advised him that, with good behavior, he could be eligible for parole after serving only six years of the thirty-five year sentence offered in the plea bargain. In reality, since Hill was a second offender, he could not become eligible for parole in less than eight years and nine months. In testimony the District Court accepted as true, Hill asserted that but for the erroneous parole eligibility advice from his attorney he would not have pleaded guilty and would have gone to trial, even though trial would have exposed him to a possible sentence of five to fifty years or life imprisonment, and even though on a sentence of life imprisonment he would have had no possibility of parole unless the Governor were somehow persuaded to commute the sentence to a term of years.

I agree we cannot say the District Court's findings are clearly erroneous. I disagree, however, with the conclusion that these findings establish constitutionally inadequate performance by Hill's attorney.

The claim that Hill asserts in the present proceeding is identidal to the claim he made, and we rejected, over five years ago. *See Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). The reasoning of that decision, which assumed all the facts the District Court now has found, is as persuasive to me now as it was then. In affirming the District Court's denial of habeas relief, we expressly held that counsel's advice concerning Hill's parole eligibility, even though not entirely accurate, did not amount to constitutionally inadequate performance. *Id.* at 572. Rehearing en banc was granted, and the panel decision thereby was vacated. On rehearing,

however, the en banc Court affirmed the District Court by an equally divided vote, thus sustaining the result reached by the panel decision. 764 F.2d 1279 (8th Cir. 1984) (en banc).

Our en banc decision was affirmed by the Supreme Court on procedural grounds. *See Hill v. Lockhart*, 474 U.S. 52 (1985). Holding merely that Hill's allegations were insufficient to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), the Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." 474 U.S. at 60. The Supreme Court thus declined to decide the constitutional merits of Hill's claim.

I believe our original panel decision was correct in holding that Hill's claim lacks constitutional footing. First, I seriously doubt that the Sixth Amendment ever can be brought into play by allegations of incorrect advice concerning parole eligibility. The subject of parole eligibility, though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely, the obtaining of either reduced charges, a below-the-maximum sentence, or both. Moreover, even indulging the assumption, without deciding, that a case might be found in which counsel's advice concerning parole eligibility is so far off the mark that the Sixth Amendment right to the effective assistance of competent counsel is violated, in my judgment this is not such a case. The advice given by Hill's counsel certainly was not "gross[ ] misinform[ation]" on the order of that found in *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (counsel misrepresented parole eligibility of eight and three-quarter years as only one and three-quarters years). For the reasons well-explicated in our 1984 panel opinion, which I will not here restate, I would find no

constitutional violation and therefore would reverse the judgment of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2237

William Lloyd Hill,	*
	*
Appellee,	*
	* On Appeal from the
v.	* United States District
	* Court for the Eastern
A.L. Lockhart, Director,	* District of Arkansas.
Arkansas Department of	*
Correction,	*
	*
Appellant.	*

Submitted: January 9, 1989

Filed: June 14, 1989

Before McMILLIAN, ARNOLD, and BOWMAN, Circuit Judges.

ARNOLD, Circuit Judge.

The District Court [1] granted habeas corpus relief to William Lloyd Hill, who is under a sentence of 35 years for murder and theft. A.L. Lockhart, Director of the Arkansas Department of Correction, appeals. He argues (1) that the Court should have dismissed Hill's successive habeas petition pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases and *Sanders v. United States*, 373 U.S. 1 (1963), and (2) that the Court erred in ruling that Hill's guilty plea was involuntary, and therefore invalid, as a result of constitutionally inadequate advice by counsel regarding parole eligibility, entitling Hill to a trial. We affirm. In hearing Hill's second petition, the District Court did not abuse its discretion, because there had been no final determination on the merits of Hill's first petition. And the erroneous parole eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), rendering Hill's plea invalid.

I.

Hill was charged with first-degree murder and theft of property occurring on October 1, 1978. He pleaded guilty in the Circuit Court of Pulaski County, Arkansas, on April 6, 1979, explaining to the Court that he and Darrel Pitts had been to a bar, and Pitts had "hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him." J.A. 53. Hill said he shot Pitts and fled the state with Pitts's car and gun. The Court accepted Hill's plea and sentenced him to concurrent sentences of 35 years for the murder and 10 years for the theft.

Prior to his plea hearing, Hill had asked his appointed counsel about his potential sentence and parole eligibility

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[1] The Hon. Garnett Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas.

under Arkansas law. Tr. 23. His attorney told him that he faced a sentence of five to fifty years or life, and that he would be eligible for parole after serving one-third of his sentence, with time off for good behavior. [2] In fact, Ark. Stat. Ann. §§43-2828, 43-2829 (1977), [3] known as "Act 93," required individuals with prior convictions to complete not one-third but one-half of their sentences, with time off for good behavior. Mr. Hill, who had been convicted of burglary in Florida in 1978, apprised his counsel of that prior conviction at the outset of their first meeting (Tr. 21, 29), but his counsel never mentioned Act 93 or its effect on Hill's parole eligibility.

During plea negotiations, Hill rejected a proposal by the prosecution for a 45-year prison term in exchange for a guilty plea because his lawyer told him that with such a sentence he would be eligible for parole in "about nine years. And I told him that I couldn't see how that would be in my benefit to take that sentence because it was my understanding that people were getting out from life sentences [as a result of executive clemency] after only serving seven years, and he said that that was true." Tr. 24-25. Hill testified that he understood commutations of life sentences to be fairly commonplace, though not guaranteed. Tr. 30-32. [4] Using seven years as his benchmark, Hill then accepted the prosecution's subsequent offer of a 35-year sentence in exchange for his plea of guilty, since his counsel had told him that his parole eligibility would then be six years (Tr. 26, 29), and had advised him to accept that offer. Presumably, counsel calculated as follows: one-third of a 35-year term is approximately twelve years, and with optimal behavior, Hill could be out in six years. However, as

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Ark. Stat. Ann. §46-120 (Repl. 1977) provided that an inmate's good behavior can produce a sentence reduction of thirty days for every thirty days actually served.

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These statutes have been recodified as A.C.A. §§16-93-602, 603, and 604 (1987).

a second offender, Hill actually must serve one-half of the 35-year term (approximately eighteen years), so that with the maximum time off for good behavior, his earliest parole eligibility is slightly less than nine years, the very term he had rejected when he turned down the 45-year bargain first offered him.

The judge at the plea hearing reinforced Hill's misconception by stating, "[i]t is agreed under the negotiated plea. You will be required to serve at least one-third of your time before you are eligible for parole." J.A. 55. The judge never asked Hill if he had any prior convictions. [5]

As soon as Hill received notice that he would have to serve a minimum of nine years, rather than the six he had been told, he contacted the prison records office to check on what he thought must be a mistake. When that office informed him that he was subject to Act 93, Hill tried to get in touch with his lawyer, who never responded to his inquiry. Hill then attempted to do his own research on Act 93, and filed an unsuccessful Rule 37 petition for post-conviction relief in state court. Next, he filed a *pro se* habeas corpus petition in federal district court. On February 28, 1983, that petition, too, was denied, along with Hill's request for an evidentiary hearing. The District Court

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At the time, this was a correct perception, or at least one widely shared by the bar. Commutations of life sentences have become less frequent in recent years.

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The judge may have assumed from the plea statement which Hill signed that he had no criminal record. But that statement, which reads, "You are charged with a felony and with 0 prior convictions" (J.A. 57), indicates only that no former offenses were part of Hill's present charge, as could have occurred using the Habitual Offender Act. See Dist. Ct. Order of April 5, 1988, n.l, J.A. 72, and uncontradicted testimony, Tr. 14-16. The Habitual Offender Act, Ark. Stat. Ann. §41-1001 (Repl. 1977), produces a longer formal sentence. Act 93, on the other hand, affects parole eligibility after the sentence, whatever it is, has been pronounced.

decided that the alleged error regarding Hill's parole-eligibility date was not of such consequence as to render Hill's plea involuntary or his counsel's performance constitutionally inadequate. *Hill v. Lockhart*, No. PB-C-81-217 (E.D. Ark. 1983).

Hill appealed that denial to this Court, which affirmed on April 9, 1984, by a divided vote. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). The majority agreed with the District Court that the alleged misadvice given to Hill did not rise to the level of a deprivation of the constitutional right to counsel. It reasoned that Hill had been told by the state trial judge that he would have to serve at least one-third of his sentence (approximately twelve years) before becoming parole eligible. Since Hill would actually be eligible in nine years, he was no worse off than the judge had suggested. [6] The Court characterized Hill's challenge as involving "details of parole eligibility [which] are considered collateral rather than direct consequences of a plea," and noted that "a defendant need not be informed [of them] before pleading guilty." *Id.* at 570. Without proof of "gross misinformation" on the order of that found in *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) (where counsel misrepresented parole eligibility of eight and three-quarters years as one and three-quarters years), the Court would not find constitutionally ineffective assistance. *Hill, supra*, 731 F.2d at 571. The dissent argued that the error in Strader's and Hill's cases was the same -- counsel's failure to look up the applicable law and advise his client of the correct eligibility date. *Id.* at 573-74 (Heaney, J., dissenting).

This Court granted Hill's petition for rehearing en banc, thereby vacating the three-judge panel's decision. The en banc Court affirmed the District Court's denial of habeas relief by an equally divided vote on September 20, 1984. *Hill v. Lockhart*, 764 F.2d 1279 (8th Cir. 1984) (en banc). Hill then

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Of course, the fallacy in this logic is that credit for good time is factored in on the one hand but not on the other.

took his case to the United States Supreme Court, which affirmed our judgment on November 18, 1985, but did so on procedural grounds, declining to reach the merits. *Hill v. Lockhart*, 474 U.S. 52 (1985). The Court applied the test of *Strickland v. Washington*, *supra*, for evaluating ineffective assistance of counsel claims, to the context of guilty-plea challenges. *Hill*, *supra*, 474 U.S. at 58. The Court did not determine if Hill's claim met the first part of the *Strickland* test—i.e., whether or not the representation he received "fell below an objective standard of reasonableness," *id.* at 57 (quoting *Strickland*, *supra*, 466 U.S. at 688)—because the Court decided that Hill's pleadings failed to allege the "prejudice" required by the second part of the *Strickland* test. Hill's *pro se* habeas petition did not explicitly allege that he was prejudiced by his attorney's error, in the sense that he would have elected to go to trial had counsel accurately informed him of his parole-eligibility date under the proposed sentence. According to the Supreme Court, Hill "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Hill*, *supra*, 474 U.S. at 60.

Following the Supreme Court's ruling based on the procedural defect in his first petition, Hill filed another habeas petition, which sought to cure that defect with a more specific allegation of prejudice. The District Court, on July 28, 1986, denied the state's motion to dismiss Hill's successive petition as an abuse of the writ under 28 U.S.C. §2244(b) and Rule 9(b) of the Rules Governing Section 2254 Cases. J.A. 37. On May 22, 1987, a United States Magistrate [7] conducted an evidentiary hearing at which Hill and an expert witness testified about the adequacy of Hill's counsel and the prejudicial impact of his erroneous advice. The Magistrate, believing the earlier Eighth Circuit panel

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The Hon. John F. Forster, Jr., United States Magistrate for the Eastern District of Arkansas.

decision on the merits to be binding, submitted a recommendation on January 29, 1988 to deny habeas relief. J.A. 63. But the District Court, by order of April 5, 1988, returned the case to the Magistrate for additional findings, since it did not agree that the prior Court of Appeals decision was controlling. J.A. 70. The Magistrate then submitted Amended Findings of Fact and Conclusions of Law and a recommendation for habeas relief, on June 28, 1988. J.A. 75. These were adopted by the District Court on July 19, 1988, entitling Hill to be tried within ninety days or be released according to the writ. *Hill v. Lockhart*, No. PB-C-86-25 (E.D. Ark. 1988). We stayed this order pending appeal.

II.

The District Court did not commit an abuse of discretion by reconsidering Hill's case, this time with a full evidentiary hearing. According to Rule 9(b) of the Rules Governing Section 2254 Cases, "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . " This rule grew out of the standard set in *Sanders, supra*, 373 U.S. at 15:

> Controlling weight may be given to denial of a prior application for federal habeas corpus . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Both Rule 9(b) and *Sanders* concern the appropriateness of denying a successive petition; neither prohibits a judge from exercising discretion to *Grant* a hearing. [8]

8

The State argues, as well, for dismissal under 28 U.S.C. §2244(b), which also uses discretionary language: "a subsequent application for a writ of habeas corpus . . . *need not* be entertained . . . " (emphasis added).

Moreover, while Hill's first and second petitions raise essentially the same grounds, he never got a final determination on the merits of his first petition. The initial opinion of the District Court and that of the three-judge panel do reach the merits of Hill's ineffective-assistance claim. However, we vacated the panel decision by granting Hill's petition for rehearing en banc, and the Supreme Court superseded the District Court's discussion on the merits by affirming the denial of habeas relief on a procedural ground.

The Supreme Court granted Hill certiorari to resolve the conflict between his case and *Strader, supra* (where the petitioner won habeas relief), but it decided to reserve consideration of the merits because of Hill's failure to allege facts which, if true, would entitle him to relief.

> We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice."

Hill, supra, 474 U.S. at 60. As the Supreme Court explained in similar circumstances in *Sanders, supra*, 373 U.S. at 19, "the denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient." And the concurrence in *Hill*, which disagreed about the sufficiency of the pleadings and went on to discuss the merits, strongly supports the District Court's ultimate decision to grant habeas relief.

> [H]ad the petitioner's attorney known of a prior conviction and still informed petitioner that he would be eligible for parole after serving one-third of his sentence[,] petitioner would be entitled to an evidentiary hearing and an opportunity to prove that counsel's failure to advise him of the effect of

> Ark. Stat. Ann. §43-2829B(3) (1977) amounted to ineffective assistance of counsel. The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis adopted by the majority, as such an omission cannot be said to fall within "the wide range of professionally competent assistance" demanded by the Sixth Amendment. *Strickland v. Washington, supra,* at 690.

Hill, supra, 474 U.S. at 62 (White, J., concurring, joined by Stevens, J.).

Finally, we reject the state's appeal to the doctrines of *res judicata* and law of the case. *Res judicata* as such does not apply in habeas proceedings, and the only "law of the case"—assuming that doctrine would apply—is the Supreme Court's holding that Hill's first habeas petition was deficient as a matter of pleading.

The District Court did not abuse its discretion in entertaining this second habeas petition.

III.

Turning to the merits, we affirm the District Court's determination that Hill's counsel was constitutionally ineffective and that his erroneous advice affected the outcome of the plea process, entitling Hill to withdraw his guilty plea and have his case heard at trial. To be valid, a plea must represent a voluntary and intelligent choice among the alternatives available to the defendant. *North Carolina v. Alford,* 400 U.S. 25, 31 (1970). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill, supra,* 474 U.S. at 56 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)).

The failure of Hill's lawyer to ascertain, through minimal research, the applicable statute governing parole eligibility for second offenders, and to inform his client accurately when asked about that eligibility, fell below the objective standard of reasonableness required by the Sixth Amendment. We agree with Hill's expert witness [9] that the "earliest potential parole eligibility date . . . [is] normally one of the most important factors to a criminal client." Tr. 11. The basic minimum amount of time that a defendant will have to serve is an integral factor in plea negotiation; it is a direct, not a collateral, consequence of the sentence. While the state has no federal constitutional duty to inform a defendant about parole, see *Hill, supra*, 474 U.S. at 56, counsel owes a duty to provide accurate information about his client's earliest possible release date, especially when the client asks for it.

The statute which requires Hill to serve one-half rather than one-third of his sentence, with credit for good time, is not like other factors (e.g., "petitioner's behavior and legislative and administrative changes in parole eligibility rules," *Hill, supra*, 731 F.2d at 572) that may affect Hill's eligibility date down the road. [10] To advise his client correctly, the lawyer needed no crystal ball; he had only to consult the Arkansas Statutes and determine the provision applicable to second offenders. See *Strader, supra*, 611 F.2d at 63, and *O'Tuel v. Osborne*, 706 F.2d 498, 499 (4th Cir. 1983). Act 93, which had been in effect for over two years by the time Hill pleaded guilty, posed no special research challenge.

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An experienced criminal defense attorney and past president of the Arkansas Association of Criminal Defense Lawyers.

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Hill understood, when he entered his plea, that actual release on parole was not guaranteed. Tr. 31.

Not only had Hill explicitly asked his counsel about the parole system in Arkansas, Tr. 23, but he had made clear that the timing of eligibility was the dispositive issue for him in accepting or rejecting a plea bargain. He told his attorney that he considered it no bargain to forego a trial unless his eligibility would be sooner than seven years, which he understood to be the time he could serve with commutation of a life sentence. Tr. 24-26. The Plea Statement bears the signature of Hill's counsel, immediately below the words: "His plea of guilty is consistent with the facts he has related to me and with my own investigation of the case." J.A. 57. Given the attorney's knowledge of his client's particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in *Strickland*.

As for the other component of the *Strickland* test, the District Court's finding of prejudice is hardly clearly erroneous. The judgment that Hill's plea would have been different but for the misadvice he received was well-supported by the record. [11] At the evidentiary hearing, Hill's testimony regarding his conversations with counsel, including those focused on the parole-eligibility dates, went unchallenged. The judge asked Hill: "If [your attorney] had advised you that you would have to do around nine years before you could possibly be paroled, would you have entered the plea?" Tr. 26. Hill responded: "No, sir, I wouldn't, and the reason was just because I at the time believed that I'd have just as good a chance on a life sentence of getting out before nine years." *Id.*

11

This part of the *Strickland* test is evaluated subjectively, not objectively. That is, it does not matter whether a reasonable person would have pleaded differently, given the correct information of nine, instead of six, years. What counts is the likelihood that Hill would have pleaded differently.

Hill's rejection of the initially offered 45-year sentence, which he thought carried a nine-year parole-eligibility date, and his subsequent acceptance of the 35-year offer, with the six-year parole eligibility his lawyer described, further support the finding of prejudice. Had Hill known that the 35-year sentence really involved nine-year eligibility for him, it seems reasonably probable that he would have declined to plead guilty in exchange for that sentence.

To succeed under *Strickland*, Hill need not show prejudice in the sense that he probably would have been acquitted or given a shorter sentence at trial, but for his attorney's error. [12] All we must find here is a reasonable probability that the result of the plea process would have been different—that Hill "would not have pleaded guilty and would have insisted on going to trial," *Hill, supra*, 474 U.S. at 59—if counsel had given accurate advice. We uphold the District Court's finding that Hill suffered prejudice as a result of the ineffective counsel he received. [13]

Affirmed.

BOWMAN, Circuit Judge, dissenting.

Although I agree we cannot say that the District Court abused its discretion by reconsidering Hill's case, I

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Sometimes, a court must consider how prejudicial the error would have been at trial—e.g., when an attorney fails to consider a possible affirmative defense, and accordingly advises the client to plead guilty. See *Hill, supra*, 474 U.S. at 59.

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We believe that recently Hill was approved for parole. The relief he will receive under our opinion is a trial. If he is found guilty, he could receive a more severe sentence than the 35 years he got in the first place. It is possible, then, that he could be reimprisoned, even for life. At the oral argument, appointed counsel assured us that Hill is aware of this danger and wishes to press his claim for relief even so. We are grateful to appointed counsel for his diligent service in this case.

respectfully disagree with the conclusion that Hill is entitled to habeas corpus relief.

The identical claim that Hill now asserts was rejected by our Court over five years ago. *See, Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). In that decision, we affirmed the District Court's denial of habeas relief, and we expressly held that counsel's advice concerning Hill's parole eligibility, even though not entirely accurate, did not amount to constitutionally inadequate performance. *Id.* at 572. Rehearing en banc was granted, and the panel decision thereby was vacated. On rehearing, however, the en banc Court affirmed the District Court by an equally divided vote, thus sustaining the result reached by the panel decision. 764 F.2d 1279 (8th Cir. 1984) (en banc).

Our en banc decision was affirmed by the Supreme Court on procedural grounds. *See Hill v. Lockhart*, 474 U.S. 52 (1985). Holding merely that Hill's allegations were insufficient to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 668 (1984), the Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel." 474 U.S. at 60. The Supreme Court thus declined to decide the constitutional merits of Hill's claim.

I believe our original panel decision was correct in holding that Hill's claim lacks constitutional footing. First, I seriously doubt that the Sixth Amendment ever can be brought into play by allegations of incorrect advice concerning parole eligibility. The subject of parole eligibility, though no doubt of keen interest to the accused, is simply not central to what plea bargaining is all about, namely, the obtaining of either reduced charges, a below-the-maximum sentence, or both. Moreover, even indulging in the assumption, without deciding, that a case might be found in which counsel's advice concerning parole eligibility

is so far off the mark that the Sixth Amendment right to the effective assistance of competent counsel is violated, in my judgment this is not such a case. For the reasons well-explicated in our 1984 panel opinion, which I will not here restate, I would find no constitutional violation and therefore would reverse the judgment of the District Court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WILLIAM LLOYD HILL PLAINTIFF

v. CASE NO. PB-C-86-25

A. L. LOCKHART, Director,
Arkansas Department of Correction DEFENDANT

JUDGMENT

Pursuant to the Order entered July 20, 1988 adopting the Magistrate's Amended Findings and Recommendations,

IT IS CONSIDERED, ORDERED AND ADJUDGED that this Petition be, and it is hereby, dismissed with prejudice. The State of Arkansas will try the petitioner within 90 days of the Court's Order adopting the Magistrate's Amended Findings and Recommendations or the writ shall issue.

Dated this 28th day of July, 1988.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WILLIAM LLOYD HILL PETITIONER

v. CASE NO. PB-C-86-25

A. L. LOCKHART, Director,
Arkansas Department of Correction Respondent

ORDER

The Court has received the "Amended Recommended Findings of Fact and Conclusions of Law" from Magistrate John F. Forster, Jr. After carefully reviewing same, the Court adopts the Magistrate's factual findings in their entirety. The Court notes that the Magistrate found that:

> Petitioner would not have pleaded guilty but for the erroneous parole advice from his attorney; and that he was prejudiced by so doing because of the drastic difference between what he was led to expect and the reality of his parole possibilities.

Apparently this testimony went unchallenged. The Court notes that the petitioner's attorney is now deceased.

The Court first points out that this problem will only arise in those courts which permit this type of plea bargain. Where *the Court* fixes the penalty completely on its own, the attorney's possible misrepresentation concerning parole eligibility will be of no consequence because the guilty plea will be taken before the sentence is even considered.

It further occurs to the Court that, even in the plea bargain context, this problem can be avoided if the Court makes proper inquiries at the time of the arraignment and the taking of the guilty plea. The Court could inquire of the defendant if any representations had been made to the defendant by the state or his own counsel as to any possible parole eligibility dates. If so, that information could be spread on the record and its accuracy verified before the plea was accepted.

The legal questions presented here are close ones as indicated by the difficulty that both the Eighth Circuit Court of Appeals and the U.S. Supreme Court had therewith. Nevertheless, the Court is convinced that, under

the present state of the law, and accepting the Magistrate's factual findings, the conclusion must follow that the petitioner is entitled to a trial just as if he had entered a "not guilty" plea to the charges against him. The Magistrate was obviously impressed with the fact that the defendant turned down a proposed term of 45 years before accepting what amounted to a term of 35 years.

IT IS THEREFORE ORDERED that the State of Arkansas shall try the petitioner on the charges underlying his murder and theft convictions within ninety (90) days of the date of this Order, or the writ shall issue.

Dated this 19th day of July, 1988.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

WILLIAM LLOYD HILL — PETITIONER

vs. CASE NO. PB-C-86-25

A. L. LOCKHART, Director,
Arkansas Department of Correction — RESPONDENT

AMENDED
RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The sole issue in this habeas corpus case is whether erroneous advice by counsel as to parole eligibility constitutes ineffective assistance of counsel rendering a guilty plea invalid. The magistrate concludes that it does. Therefore, the Petitioner's application for a writ of habeas corpus should be granted.

This is Petitioner's second federal habeas action. His first petition involved the same issue presented here and was resolved against the Petitioner. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984) (*Hill I*) (holding that erroneous legal advice concerning parole eligibility does not constitute ineffective counsel). The United States Supreme Court granted *certiorari* and affirmed on procedural grounds only, stating in a concurring opinion that if properly pleaded under the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), the conduct alleged would violate the 6th Amendment. See *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985).

In view of the statements contained in the Supreme Court's decision, Petitioner has refiled his habeas claim

specifically alleging that he received erroneous advice about parole eligibility from his attorney in 1979 when he pleaded guilty to first degree murder and theft of property in Pulaski County, Arkansas, resulting in a 35-year prison sentence. Petitioner alleges further that he would not have pleaded guilty but for his attorney's erroneous advice, and that he was prejudiced as a result.

The Respondent's motion to dismiss the instant petition as an abuse of the writ under Rule 9 of the *Rules Governing §2254 Cases in the United States District Courts* was denied. An evidentiary hearing was conducted on May 22, 1987. After receiving written briefs by the parties, the case was submitted for decision on December 3, 1987.

As a preliminary issue that might prove dispositive of Petitioner's claims, Respondent urged the Court to hold that the Eighth Circuit's previous ruling in *Hill I* forecloses reconsideration of Petitioner's claim in the instant petition. By order of April 5, 1988, the District Court rejected this proposition. Therefore, the magistrate must determine (1) whether the performance of Petitioner's attorney was "objectively reasonable" and, if not, (2) whether Petitioner was "prejudiced" by the attorney's failure to perform in an objectively reasonable manner. See *Strickland*, supra.

FACTS

The magistrate finds the following to be the material facts. Petitioner was charged with one count of first degree murder and one count of theft in Pulaski County, Arkansas, on November 13, 1978. [1] He was represented by William

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The felony information alleged that on October 1, 1978, Petitioner killed Darrel Pitts by shooting him and took property belonging to Pitts worth over $100.00. Under *Ark. Stat. Ann.* §41-1502(3), first degree murder is a Class A felony. Theft of property worth over $100.00 is a Class C felony. *Ark. Stat. Ann.* §2203(b)(i).

Patterson, Jr., a Deputy Public Defender, who is now deceased. Mr. Patterson inquired about Petitioner's prior felony convictions and was told that Petitioner had been previously convicted of burglary in the State of Florida on March 1, 1978.

Under Arkansas statutes in effect on October 1, 1978, when the crimes were committed, the penalty for first degree murder was a term of imprisonment ranging from five (5) to fifty (50) years, or life. *Ark. Stat. Ann.* §41-901(1)(a) (1977). The penalty for theft of property was a term of imprisonment ranging from two (2) to ten (10) years. *Ark. Stat. Ann.* §41-901(1)(c) (1977). During plea negotiations, the prosecuting attorney offered Petitioner a prison term of 45 years in exchange for a guilty plea. The prosecutor later offered Petitioner concurrent sentences of 35 years and 10 years for guilty pleas to his murder and theft charges respectively. Petitioner accepted this offer upon the advice of his attorney.

In the process of deciding whether to accept the plea offer, Petitioner asked his attorney when he would be eligible for parole. The attorney told him that he would be eligible for parole within six (6) years, with good behavior. [2] Petitioner testified that he rejected the 45-year offer because the attorney told him that it would take nine (9) years to become parole eligible under a 45-year sentence. The legal perimeters of parole eligibility were a fundamental component in Petitioner's decision-making process concerning whether to accept or reject an offer of a particular term of years in prison in exchange for a negotiated plea of guilty to the criminal charges. Petitioner testified that he would have gone to trial rather than

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Under *Ark. Stat. Ann.* §46-120 (Repl. 1977), Arkansas inmates may become eligible, by good behavior, to receive credits of 30-day sentence reductions for every 30 days actually served, effectively reducing both the actual length of confinement required to complete a sentence and to become eligible for parole.

voluntarily accept any sentence from which he could not, under optimum conditions and his best behavior, have achieved parole eligibility in less than seven (7) years. Petitioner entered the guilty plea because his attorney advised him that he could achieve parole eligibility under a 35-year sentence in six (6) years, with good behavior.

The attorney's advice was incorrect. Petitioner was a second offender because of his previous felony conviction in Florida. *Ark. Stat. Ann.* §41-1002 (Repl. 1977). The attorney knew this and considered the previous felony while advising Petitioner that he was not likely to be charged as a repeat offender. See *Ark. Stat. Ann.* §41-1001 (Repl. 1977). However, the attorney did not correctly advise Petitioner of his potential parole eligibility under Act 93 of 1977, effective on April 1, 1977, codified as *Ark. Stat. Ann.* §§43-2828, 43-2829. [3] Act 93 changed the amount of time that an offender must serve in prison before becoming parole eligible, for persons committing crimes after April 1, 1977, from the amount of time required under prior law.

Prior to April 1, 1977, a second offender could become eligible for parole after serving one-third (1/3) of his sentence, with credit for good time allowances. Persons convicted of crimes committed prior to April 1, 1977, are entitled to have their parole eligibility computed under this formula. See *Ark. Stat. Ann.* §43-2807 (Repl. 1977), recodified as A.C.A. §16-93-601 (1987). Thus, a person who was a second offender, serving a 35-year prison term for a crime committed prior to April 1, 1977, could become eligible for parole in approximately six (6) years if he

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These statutes have been recodified as A.C.A. §§16-93-603, 16-93-604 (1987).

received the maximum amount of good-time credit possible. [4]

Effective April 1, 1977, the Arkansas Legislature changed the amount of time that a second offender, who committed a crime after that date, would have to serve before becoming eligible for parole. Act 93, codified originally as *Ark. Stat. Ann.* §§43-2828, 43-2829, recodified in 1987 as A.C.A. §§16-93-602, 603 and 604, requires a second offender to serve one-half (½) of his sentence before becoming parole eligible.

Petitioner was charged with having committed a crime on October 1, 1978, eighteen (18) months after the effective date of Act 93. Thus, in order for him to become parole eligible under a 35-year prison sentence, he must serve or receive credit for 17 years and six (6) months of imprisonment. Receiving the maximum amount of good time credits allowed, he could not become parole eligible in less than eight (8) years and nine (9) months.

APPLICABLE LAW

The test for determining the validity of a guilty plea is whether the plea represented a voluntary and intelligent choice among the alternatives available to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970). A defendant who was represented by counsel may successfully attack, and have stricken as involuntary and unintelligent, a guilty plea that was made on the advice of an attorney whose performance in so advising was below the level of representation mandated by the 6th

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The formula would work as follows: One-third (⅓) of a 35-year sentence would be eleven (11) years and eight (8) months. A person receiving the maximum amount of good-time credits possible (30 days additional credit for each 30 days actually served) would be credited with serving one-third (⅓) of a 35-year sentence at the end of 70 months or five (5) years and 10 months.

Amendment. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602 (1973). The appropriate standard to determine whether an attorney's performance is up to constitutional muster, in plea cases, is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985) (*Hill I*).

In *Hill I*, supra, the Supreme Court (while reviewing the instant case) reiterated its holding in *Strickland*. In order to establish an ineffective assistance of counsel claim, a defendant must show "that counsel's performance fell below an objective standard of reasonableness . . . (and) . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hill* 106 S.Ct. at 369. Richard N. Moore, Jr., an experienced criminal defense attorney, testified for Petitioner as an expert witness at the hearing.[5] Mr. Moore testified that investigation of the existence and impact of prior felony convictions upon a client's parole eligibility and sentencing possibilities is an essential element of providing competent legal representation in a criminal plea negotiation situation. There is no question that investigation is an essential part of the adversary process and that failure by an attorney to conduct investigation falls below the objectively reasonable standard of performance set forth in *Strickland*, supra, *Kimmelman v. Morrison*, ____ U.S. ____, 106 S.Ct. 2754 (1986); *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986); *Hudson v. Lockhart*, 679 F.Supp. 891 (E.D. Ark. 1986), affirmed ____ F.2d ____ (8th Cir. 1987 per curiam).

The magistrate finds that Petitioner's attorney did not know the impact of Act 93 upon Petitioner's eligibility for parole as a second offender, and that he incorrectly advised

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Mr. Moore is a past president of the Arkansas Association of Criminal Defense Lawyers, a former deputy prosecuting attorney, and holds memberships in the National Association of Criminal Defense Lawyers, the Association of Trial Lawyers of America, and the Arkansas Trial Lawyers Association.

Petitioner concerning parole eligibility in connection with a proposed plea of guilty without investigating the applicable law. [6] This conduct by the attorney was below the objective standard of reasonableness required of attorneys representing criminal defendants. Therefore, the first prong of the *Strickland* test is met.

The magistrate also finds that Petitioner would not have pleaded guilty but for the erroneous parole advice from his attorney; and that he was prejudiced by so doing because of the drastic difference between what he was led to expect and the reality of his parole possibilities. While it is true that parole is only a possibility, the application of rules allowing or disallowing parole consideration for significant periods of time can reach a constitutional magnitude. See *Bosnick v. Lockhart*, 283 Ark. 206, 677 S.W.2d 292 (1984) (applying an *ex post facto* analysis to Arkansas parole eligibility statutes). See also *Hill I*, 106 S.Ct. at 372 (concurring opinion).

It is, therefore, the magistrate's conclusion that the pleas of guilty entered by Petitioner on April 6, 1979, in the Pulaski County Circuit Court to the charges of murder and theft were invalid because the ineffectiveness of his attorney rendered them involuntary and unintelligent. Accordingly, the District Court should order the State of Arkansas to allow Petitioner to plead anew and to conduct a trial against Petitioner on the charges underlying his murder and theft convictions within ninety (90) days or the writ should issue.

/s/ John J. Foster, Jr.
UNITED STATES MAGISTRATE

DATE: June 28, 1988

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The Court notes that Act 93 had been in effect over two years when Petitioner entered his guilty plea on April 6, 1979.

NO. 89-1759

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

A.L. Lockhart, Director,
Arkansas Department of Correction — Petitioner

vs.

William Lloyd Hill — Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

On June 30, 1981, Respondent William Lloyd Hill, a prisoner in the Arkansas Department of Correction, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Arkansas, Western Division. Respondent attacked the voluntariness of his guilty plea entered in the Pulaski County Circuit Court in 1979. The State of Arkansas had charged Respondent with first degree murder and theft of property. A negotiated plea entered into by Respondent resulted in a sentence of 35 years imprisonment for first degree murder with a 10-year concurrent term for theft of property. In his first Petition for Writ of Habeas Corpus, Mr. Hill alleged that his attorney informed him prior to pleading that he would only have 6 years to serve on his sentence if he "stayed out of trouble." In his first Petition, Mr. Hill alleged that his attorney failed to inform him of the ramifications of Ark. Stat. Ann. §43-2828(2) and §43-2829(3), known as Act 93, now recodified as A.C.A. §19-93-602,603. These sections govern potential parole eligibility and extend lengthier terms for second offenders. As a result of a previous felony conviction, Mr. Hill was a second offender under the Act. As a second offender, Mr. Hill was not eligible for parole consideration until having served one-half of his term less good time or approximately 9 years.

The United States District Court entered an Order on the first Petition on March 2, 1983, denying the Respondent's request for an evidentiary hearing. Mr. Hill appealed to the United States Court of Appeals for the Eighth Circuit asserting that he was entitled to an evidentiary hearing in regard to the voluntariness of his plea and the competency of his court-appointed attorney. The three-judge panel of the Eighth Circuit by a two to one vote affirmed the decision of the United States District Court. Hill v. Lockhart, 731 F.2d 568 (8th Cir. 1984). Mr. Hill petitioned for rehearing en banc. Rehearing en banc was granted. On September 20, 1984, by a five-five split vote the Eighth Circuit Court of Appeals affirmed the dismissal by the United States District Court. Hill v. Lockhart, 764 F.2d 1279 (8th Cir. 1985).

Mr. Hill petitioned for Writ of Certiorari to the United States Supreme Court and certiorari was granted on March 18, 1985. The decision of the United States Supreme Court was rendered on November 18, 1985, in Hill v. Lockhart, 474 U.S. 52 (1985). The Court affirmed the judgment of the Court of Appeals but as a result of a pleading defect in Hill's original pro se Petition. Specifically, the United States Supreme Court found that Mr. Hill failed to allege that he would not have entered the plea but for the incompetent advice of counsel.

The concurring opinion noted that Mr. Hill had stated in his objections to the magistrate's recommended findings of fact and conclusions of law that he would not have entered the plea except for counsel's erroneous advice. Hill v. Lockhart, 474 U.S. at 63. Mr. Justice White and Mr. Justice Stephens further stated that if Hill proved these allegations at a habeas hearing he would be entitled to relief. Hill v. Lockhart, 474 U.S. at 63. On January 15, 1986, Mr. Hill filed his second Petition for Writ of Habeas Corpus curing the pleading defect in his first Petition and raising once again the allegations that his plea was involuntary and that he was denied the effective assistance of counsel.

Lockhart moved to dismiss the second Petition arguing that it constituted an improper successive petition. The district court denied the Motion to Dismiss finding that the interests of justice would best be served by addressing the issues again. An evidentiary hearing was conducted before a magistrate on May 22, 1987. The magistrate filed Recommended Findings of Fact and Conclusions of Law to the effect that the district court was bound by the previous position of the Eighth Circuit. The district court returned the case to the magistrate for additional findings concluding that the magistrate was not barred from making factual findings under the Eighth Circuit's decision since the first petition was decided by the Eighth Circuit before

the Supreme Court applied Strickland v. Washington, 766 U.S. 668 (1984), to guilty pleas. The Amended Recommended Findings of Fact and Conclusions of Law by the magistrate were adopted by the United States District Court on July 29, 1988. (Pet. App. C-2) Those Findings of Fact and Conclusions of Law granted habeas relief to Mr. Hill finding that Hill's court appointed counsel incorrectly advised him as to his earliest potential parole eligibility date. This misadvice was found to be below the objective standard of reasonableness required by attorneys representing criminal defendants. The court also found that Mr. Hill would not have pleaded guilty but for the erroneous parole advice from his attorney, and that he was prejudiced in so doing because of the drastic difference between what he was led to expect and the reality of his parole possibilities. (Pet. App. D)

A divided panel of the Eighth Circuit affirmed. Lockhart v. Hill, 877 F.2d 697 (8th Cir. 1989). Lockhart's Petition for Rehearing En Banc was granted. The district court was affirmed by a five to four vote. Lockhart v. Hill, 894 F.2d 1009 (8th Cir. 1990).

SUMMARY OF ARGUMENT

Respondent argues to this Court that the Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied in that the circuits are not in conflict on the issue presented and Petitioner cites no state cases which the Eighth Circuit decision is in conflict with. Further, the Eighth Circuit correctly held that where a defendant relies on the erroneous advise of his attorney as to his earliest potential parole eligibility date in a negotiated plea to a sentence of 35 years and waives his right to trial by jury based on that advice, he has received ineffective representation of counsel when he would have gone to trial had his counsel accurately advised him. The Eighth Circuit correctly applied Strickland v. Washington, 466 U.S. 668 (1984), and Lockhart v. Hill, 474 U.S. 52 (1985), in affirming the district court in granting Mr. Hill's habeas petition.

REASONS FOR DENYING THE WRIT

The factual events forming the basis of Hill's habeas corpus petition were succinctly set forth by the Eighth Circuit as follows.

> Hill was charged with first degree murder and theft of property occurring on October 1, 1978. He pleaded guilty in the Circuit Court of Pulaski County, Arkansas, on April 6, 1979, explaining to the court that he and Darrell Pitts had been to a bar and "Pitts had hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him." Hill said he shot Pitts and fled the state with Pitts' car and gun. The court accepted Hill's plea and sentenced him to concurrent sentences of 35 years for the murder and 10 years for the theft.
>
> Prior to his plea hearing, Hill had asked his appointed counsel about his potential sentence and parole eligibility under Arkansas law. His attorney told him that he faced a sentence of 5 to 50 or life, and that he could be eligible for parole after serving one-third of the sentence with time off for good behavior. In fact, Ark. Stat. Ann. §43-2828, §43-2829 (1977), known as "Act 93," required individuals with prior convictions to complete not one-third but one-half of their sentence with time off for good behavior. Mr. Hill, who had been convicted of burglary in Florida in 1978, apprised his counsel of that prior conviction at the outset of their first meeting, but his counsel never mentioned Act 93 or its effect on Hill's parole eligibility. (During plea negotiations, Hill rejected a proposal by the prosecution for a 45-year prison term in exchange for a guilty plea because his lawyer told him that with such a sentence he would be eligible for parole in "about 9 years. And I

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2 Ark. Stat. Ann. §46-120 (Repl. 1977) provided that an inmate's good behavior can produce a sentence reduction of 30 days for every 30 days actually served.

3 These statutes have been recodified as A.C.A. §16-93-602,603, and 604 (1987).

> told him that I couldn't see how that would be in my benefit to take that sentence because it was my understanding that people were getting out from life sentences [as a result of executive clemency] after only serving 7 years, and he said that was true." Hill testified that he understood commutations of life sentences to be fairly commonplace though not guaranteed.4 Using 7 years as his bench mark Hill then accepted the prosecution's subsequent offer of a 35-year sentence in exchange for his plea of guilty, since his counsel had told him that his parole eligibility would then be 6 years, and had advised him to accept that offer. Presumably, counsel calculated as follows: one-third of a 35-year term is approximately 12 years and with optimal behavior Hill could be out in six years. However, as a second offender Hill actually must serve one-half of the 35-year term (approximately 18 years), so that with the maximum time off for good behavior, his earliest parole eligibility is slightly less than nine years, the very term he had rejected when he turned down the 45-year bargain first offered him.
>
> ---
>
> 4 At the time this was a correct perception, or at least one widely shared by the bar. Commutations of life sentences have become less frequent in recent years.

Hill v. Lockhart, 877 F.2d 698, 699-700 (1989).

The Eighth Circuit concluded that the district court's findings that there was a reasonable probability that Hill would have insisted on going to trial had he received correct advise regarding parole eligibility was not clearly erroneous. The majority opinion in the Eighth Circuit stated, "Given the attorney's knowledge of his client's particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in Strickland." Hill v. Lockhart,

877 F.2d at 703. The Eighth Circuit noted that all the attorney needed to do was to consult the Arkansas statutes which impose no special research challenge. Hill v. Lockhart, 877 F.2d at 703. Those findings satisfied the requirements of Strickland v. Washington, 466 U.S. 668 (1984), which was applied to guilty pleas in Hill v. Lockhart, 474 U.S. 52 (1985).

The relevant findings of fact of the district court were as follows:

> 1. Mr. Patterson (his attorney) inquired about petitioner's prior felony convictions and was told that petitioner had been previously convicted of burglary in the State of Florida on March 1, 1978.
>
> 2. Under Arkansas statutes in effect on October 1, 1978, when the crimes were committed, the penalty for first degree murder was a term of imprisonment ranging from 5 to 50 years or life.
>
> 3. During plea negotiations the prosecuting attorney offered petitioner a prison term of 45 years in exchange for a guilty plea.
>
> 4. The prosecutor later offered petitioner concurrent sentences of 35 years and 10 years for guilty pleas to his murder and theft charges respectively. Petitioner accepted this offer upon the advice of his attorney.
>
> 5. In the process of deciding whether to accept the plea offer, the petitioner asked his attorney when he would be eligible for parole. The attorney told him that he would be eligible for parole within six years with good behavior.
>
> 6. Petitioner testified that he rejected the 45-year offer because the attorney told him that it would take nine years to become parole eligible under a 45-year sentence.
>
> 7. The legal parameters of parole eligibility were a fundamental component in petitioner's decision making process concerning whether to accept or reject an offer of a particular term of years in prison in

exchange for a negotiated plea of guilty to the criminal charges.

8. Petitioner testified that he would have gone to trial rather than voluntarily accept any sentence from which he could not under optimum conditions and his best behavior have achieved parole eligibility in less than seven years. Petitioner entered the guilty plea because his attorney advised him that he could achieve parole eligibility under a 35-year sentence in six years with good behavior.

9. The attorney's advice was incorrect.

(Pet. App. D-3,4)

Lockhart argues that the Eighth Circuit erred in finding that the district court was not clearly erroneous in concluding that it was reasonably probable that Hill would have insisted on going to trial when balanced against a possible 50-year or life sentence that could have resulted. Lockhart assumes that the logical outcome at trial would have been a lengthier sentence than the 35 years bargained for. There is no basis in the record for this assumption. Lockhart ignores the possibility that Mr. Hill could have received a sentence of as little as five years on first degree murder or he could have been acquitted. Hill's remarks at his sentencing that the deceased "hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him." suggests that the defense of self-defense might have been available and that lesser included offense instructions of second degree murder or manslaughter could have been given. The State's assertion that it is not reasonably probable that Hill would

have rejected the 35-year offer had he known his true parole eligibility date of nine years because of the likelihood of a lengthier sentence at trial is totally conjectural. There is no evidence in the record reflecting the strength or weakness of the State's case.

However, the conclusion that it is reasonably probable that Hill would have rejected the 35-year offer had he known his true earliest potential parole eligibility date is supported in the record. Hill had rejected a previous plea offer of 45 years according to counsel's also erroneous advice that he would have been potentially parole eligible at nine years. (Res. App. 17-18) Therefore, it is not logical to conclude then that he would have accepted a 35-year offer had he correctly known his earliest potential parole eligibility date of nine years. In adopting the Amended Recommended Findings of Fact and Conclusions of Law from the magistrate, United States District Court Judge G. Thomas Eisele noted: "The magistrate was obviously impressed with the fact that the defendant turned down a proposed term of 45 years before accepting what amounted to a term of 35 years." (Pet. App., C-3)

Hill's reasoning in rejecting the 9-year potential parole eligibility date on a 45-year sentence rested upon the belief that even on a life sentence he might only serve seven years. Hill testified that he told his attorney that he didn't see how the 9-year offer would be in his best

benefit because of his understanding that people were getting out from life sentences after serving only seven years. (Res. App. 18) Hill further testified that his attorney confirmed that information. (Res. App. 18) The reasonableness of this widespread belief that individuals were being released from prison on a life sentence after serving seven years during that era was noticed in the majority panel decision of the Eighth Circuit. Hill v. Lockhart, 877 F.2d at 700, n.4. Therefore, the only evidence in the record from which the court could determine the reasonableness of Mr. Hill's decision supports the conclusion that it is reasonably probable that he would have gone to trial had he known his true parole eligibility date.

The narrow holding in Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990)(en banc), is that where counsel acts incompetently in advising a defendant as to his earliest potential parole eligibility date and relying on that misadvice the defendant pleads guilty where he would have gone to trial, the defendant has been denied effective assistance of counsel. (The case does not suggest nor did Mr. Hill argue that there is any affirmative duty on behalf of the judge taking the plea to advise the defendant concerning parole.)

In asking this Court to grant certiorari, Lockhart states that the Eighth Circuit has taken a position which conflicts with the decisions of other federal and state

courts. The three federal cases cited by Lockhart supporting the asserted conflict within the circuits are Cepulonis v. Ponte, 699 F.2d 573 (1st Cir. 1983); Hunter v. Fogg, 616 F.2d 55 (2d Cir. 1980); and, Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967). However, a review of these three cases results in the conclusion that the holding of the Eighth Circuit in this case is not in conflict with any of them.

The First Circuit case cited by Lockhart is Cepulonis v. Ponte, supra. In that case counsel misinformed his client as to his parole eligibility date; however, the First Circuit affirmed the district court which had made the factual finding that the advice concerning parole eligibility was not a "key" factor in Cepulonis' decision to plead guilty. The First Circuit reasoned,

> Although misinformation may be more vulnerable to constitutional challenge than mere lack of information, see, e.g., Strader v. Garrison, 611 F.2d 61, 63-64 (4th Cir. 1979), a defendant seeking to set aside a guilty plea must at the very least show that correct information would have made a difference in his decision to plead guilty. (Citations omitted.)

Therefore, the Eighth Circuit is not in conflict with the First Circuit in that in Cepulonis' deliberations to plead guilty, as opposed to Mr. Hill's, his potential parole eligibility date was not found to be a "key" factor by the district court.

The Fifth Circuit case cited by Lockhart is Trujillo v. United States, supra. In this 1967 case the Fifth

Circuit took the position that a defendant was not entitled to be informed by the court upon his sentencing for narcotics violations after pleas of guilty were entered of his ineligibility for parole. This case deals with an interpretation of Rule 11 of the Federal Rules of Criminal Procedure and deals with what a federal judge must inquire about to determine whether or not a federal court guilty plea is voluntary. The issue in Cepulonis was framed as "whether ineligibility for parole is a consequence of the plea about which a defendant must be informed." Trujillo v. United States, supra at 268. In interpreting Rule 11, the Fifth Circuit held,

> We, therefore, conclude that the judge was not required to inform appellant of ineligibility for parole upon conviction of the offense charged in Count Three.

Trujillo v. United States, supra at 269. The Eighth Circuit opinion at issue in Hill v. Lockhart does not address the issue of whether or not a judge should discuss parole eligibility with a defendant when taking his plea or sentencing him. Hill v. Lockhart addresses only misadvice of counsel concerning parole eligibility relied upon by a defendant in making his decision to plead guilty and the right to effective assistance of counsel under the Sixth Amendment. Therefore, the Eighth Circuit and the Fifth Circuit are not in conflict.

Lockhart's third case is Hunter v. Fogg, supra, a Second Circuit case. In Hunter v. Fogg, supra, the

defendant received a 10-year sentence. Under New York's parole laws, the parole board and not the court set a minimum period of imprisonment that the defendant had to serve before parole would even be considered. The parole board had the discretion to set the minimum period of imprisonment at any point in time determined appropriate provided the period would not be less than one year. Hunter v. Fogg, supra at 62, n.13. Further, once a date was set, before that date was reached, the parole board could reconsider and reduce the minimum period of imprisonment so long as that period did not drop below one year. Hunter v. Fogg, supra at 62, n.13. The district court found that Hunter's attorney had misinformed Hunter prior to his guilty plea and advised him that the minimum period of imprisonment would be no greater than one-third of the maximum 10-year sentence. The attorney's affidavit which was attached to the habeas petition stated that he told Hunter that "he might anticipate a period of one-third of a 10-year sentence." The attorney told Hunter that a minimum eligibility date in excess of one-third of the maximum term was "unlikely." The Second Circuit disagreed with the district court and found that that statement implied that a minimum period of imprisonment greater than one-third of the sentence was a distinct possibility. The Second Circuit concluded that the attorney's conversation with Hunter provided no basis for concluding that the attorney did more

than give his client a prediction "couched in the language of hope, and not promise." Hunter v. Fogg, supra, at 62. The attorney did, however, correctly advise his client as to the earliest potential parole eligibility date under the then existing New York law. Hunter v. Fogg, supra at 62, n.13, n.15. The court went on to reason that even if the attorney had assured Hunter that at some point within the first one-third of his sentence he would have had an opportunity for parole release, he in fact received that opportunity. The parole board met 11 months after Hunter was sentenced to consider what minimum period of imprisonment to select and the board had complete discretion as set forth above. In Mr. Hill's case, the misadvice of the attorney was couched in positive terms. Hill was positively advised of his earliest potential parole eligibility date which was statutory and ascertainable and positively advised incorrectly.

The position taken by the Eighth Circuit in Lockhart v. Hill is not in conflict with the First, Second, and Fifth Circuit cases cited by Lockhart. Lockhart does not cite any state court cases to support his assertion that the Eighth Circuit decision is in conflict with state court decisions.

The importance of advice concerning the earliest potential parole eligibility date was termed "normally one of the most important factors to a criminal client" by

Hill's expert witness, the past president of the Arkansas Association of Criminal Defense Lawyers. (Res. App. 4) That evidence was uncontradicted. The respondent asserts that the question at issue here has been settled by this Court in its decisions in Strickland v. Washington, supra, and Hill v. Lockhart, supra. In applying the two-pronged test for ineffectiveness of counsel to guilty pleas set forth in Strickland v. Washington to this narrow question, the record clearly supports the conclusion reached by the district court and a majority of the United States Court of Appeals for the Eighth Circuit. The record in this case supports no other conclusion than the fact that there was a reasonable probability that Hill would not have entered the plea but for counsel's misadvice concerning his earliest potential parole eligibility date. The importance of such advice termed "one of the most important factors to a criminal client" is unchallenged. It is important because it is a central issue in plea bargaining.

CONCLUSION

For the reasons set forth above Lockhart's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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By: Jack T. Lassiter

Jack T. Lassiter #73072

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I did on the 31 day of May, 1990, mail a true and correct copy of the above and foregoing to the following by placing a copy of same in the United States Mail, with sufficient postage thereon to insure delivery:

Jack Gillian, Esq.
Assistant Attorney General
200 Tower Building
4th & Center Streets
Little Rock, AR 72201

Jack T. Lassiter

Jack T. Lassiter

MR. LASSITER: Correct.

THE COURT: And 23 --

MR. LASSITER: Pardon me. 43.

THE COURT: 43. All right.

MR. LASSITER: 2829 (3).

THE COURT: All right. Very well.

MR. LASSITER: We are ready to call our first witness.

THE COURT: Please do so.

MR. LASSITER: Dick Moore.

RICHARD N. MOORE, JR., PETITIONER'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. LASSITER:

Q State your name, please.

A Richard N. Moore, Jr.

Q And what is your occupation, Mr. Moore?

A I'm a lawyer.

Q And where do you practice?

A I practice in Little Rock, Arkansas.

Q How long have you been in Little Rock since law school?

A I've been practicing since 1974 in Little Rock.

Q When were you licensed as an attorney?

A August 1974.

Q And where did you go to law school?

A University of Arkansas School of Law at Fayetteville.

Q And you graduated from there in 1974?
A Yes, sir.
Q Where did you do your undergraduate work?
A University of Arkansas at Fayetteville.
Q What was your degree in there?
A Marketing.
Q Did you graduate in '70?
A '71, I believe.
Q All right. Now when you returned to Little Rock after law school, what was the first job you had as an attorney?
A I was the Deputy Prosecuting Attorney for three years.
Q And during that time as the Deputy Prosecuting Attorney, were you daily involved with the practice of criminal law?
A Yes, sir.
Q And did you try cases?
A Hundreds.
Q And did you negotiate pleas?
A Hundreds.
Q All right. After you left the Prosecuting Attorney's Office, did you go into private practice?
A Yes, sir, in 1977.
Q And have you continuously been in private practice since that time?
A Yes, sir.
Q Here in Little Rock?

A Yes, sir.
Q And with what firm?
A Dodds, Kidd, Ryan and Moore.
Q During the period of time you've been in private practice, has a large portion of your practice been devoted to criminal defense work?
A Yes, sir, probably in excess of 50 percent.
Q Would that still be true in 1987?
A Yes, sir.
Q And in the course of your private practice, have you defended folks in jury trials?
A Numerous times.
Q And in non-jury trials?
A Yes, sir.
Q And have you negotiated pleas in Federal and State court?
A Yes, sir.

MR. LASSITER: Your Honor, I will submit that Mr. Moore can be qualified as an expert in the field of criminal law as an attorney qualified to render an opinion as to the customary skill and diligence that a reasonably competent attorney would exercise in representing a client who has been criminally charged.

THE COURT: The Court so declares.

BY MR. LASSITER:
Q Mr. Moore, are you familiar with what is commonly called

Act 93?

A Yes, sir.

Q And would you just briefly describe what that means to you?

A Act 93 is the provision that sets out parole eligibility for different offenders depending upon their classifications, whether or not they'll have to serve a certain percentage of their sentence.

Q Would a reasonably competent attorney practicing criminal law be familiar with that, do you think?

A Yes, sir.

Q All right. During the course of your private practice when you have discussed plea negotiations with clients, have they ever inquired of you concerning when their earliest potential parole eligibility date might be?

A Almost every criminal client has.

Q All right. And is that usually an important factor to them?

A It's normally one of the most important factors to a criminal client.

Q All right. And if you were representing someone that let's say asked you what their earliest potential parole eligibility date would be, what information would you need in order to advise them accurately?

A You would have to know what type of sentence you're

negotiating for, what the outside bounds are, say ten years to serve. You'd want to know what their background, if they've been convicted before; if they had been convicted, had they actually gone down to the prison and served any time, actually been committed to a unit. I think basically those provisions are what you're going to have to throw in the pot to figure out just a guideline for your client.

Q When you are negotiating a plea, do you inquire of your client as to whether or not he has any prior convictions?

A Yes, sir.

Q And would a reasonably competent attorney so inquire?

A Yes, sir.

Q And if a client were to ask you when his earliest potential parole eligibility date would be, would you consider that inquiry as to whether or not he's had past convictions to be part of your duty owed to him as an attorney representing him?

A Yes.

Q All right. If an attorney advising his client as to his earliest potential parole eligibility date were to misadvise him because he did not inquire as to past convictions, do you think that that would be a breach of the duty owed to his client?

A I think if you're a criminal defense lawyer and you negotiate pleas that you definitely have to know and inquire

from your client if they have any prior convictions.

Q And would it be a failure to exercise the skill and diligence that --

A Yes.

Q -- ought to be exercised if you do not?

A Yes, sir, it would be in my opinion.

Q All right.

MR. LASSITER: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

BY MR. LASSITER:

Q Mr. Moore, let me show you what has been introduced here as Joint Exhibit Number 1, and can you tell me what that is?

A It appears to be a copy of what is a fairly standard form used in the Pulaski County criminal courts, a plea statement. This one appears to have the signature of Mr. William L. Hill and the signature of who apparently was his attorney on April 6th of '79, Mr. William Patterson, docket number 78-1922.

Q All right. The statement reads in the first paragraph that "You are charged with first-degree murder and theft of property in the Pulaski County Circuit Court. It is necessary that you fully understand the entire contents of this document.

You are charged with a felony and with zero prior convictions."

Now would you explain to the Court what that last sentence I just read means?

A The sentence "You are charged with a felony and with zero prior convictions"?

Q Yes.

A That indicates to me that if this is a negotiated plea with an attorney from the Pulaski County Prosecutor's Office that there is not any habitual charge that is part and parcel to this particular case, 78-1922.

Q Is that the purpose of having that sentence in there to reflect on the plea statement whether or not the defendant has been charged with past crimes as part of the habitual offender act?

A Yes, that would be the reason for it and it dovetails into the next sentence that sets out what the sentence would be because if they're charged with differing numbers of convictions the sentence can be enhanced within certain limits.

Q Now can you tell by looking at that whether or not Mr. Hill actually did have any prior convictions? Would that be meaningful for that purpose?

A I don't think you -- you would assume, I suppose if you're not familiar with the form that he did not have any prior convictions.

Q And based on your experience in Pulaski County, can you

tell anything about whether or not he did?

A No, I can't. All I know is he was not charged with any prior convictions under case 78-1922.

Q While you were a Deputy Prosecuting Attorney and engaged in plea negotiations, did you at times negotiate pleas with criminal defendants who had a past criminal history wherein you did not use the Habitual Offender Statute?

A Yes, sir.

Q And did you sometimes see plea statements like this plea statement where an individual did have a past felony but it did not show on the face of the plea statement?

A Yes, sir.

Q And I assume the reason is that, again, he's just not charged under the Habitual Offender Act; is that correct?

A That would be the reason that I would understand it to be on there for zero.

Q And since you have been in private practice here on the defense side of the fence, have you seen similar plea statements?

A Yes, sir. I've pled clients that have past convictions but were not charged because we were either cooperating with the Government or State, and there's usually some reason for negotiating a plea and leaving out the possible additional penalty prior convictions could bring with it.

Q And would you have filled out a similar plea statement for

those clients?

A Similar to Joint Exhibit 1?

Q In form, similar in form?

A Yes, sir. Yes, sir.

Q And in the blank where it says, "You are charged with prior convictions," with those clients you just mentioned, what would you have put in there?

A I'd have "zero."

Q All right.

MR. LASSITER: That's all I have, Your Honor.

THE COURT: Mr. Gillean.

CROSS EXAMINATION

BY MR. GILLEAN:

Q Mr. Moore, just a couple of questions. Did you know William Patterson?

A Yes, sir.

Q Do you know whether or not he was familiar with Act 93?

A Of my own knowledge, if you're asking me do I know specifically, I'd have to answer, no, I do not.

Q Okay. So you don't really know whether he advised his client about Act 93 or not?

A I have no way of knowing that, no, sir.

Q All right. Would it be possible that irrespective of what the plea statement itself says that the State was not aware of Mr. Hill's prior conviction at the time they entered into this

guilty plea in this particular thing? I mean, it's certainly possible that they did not know about it?

A Again, I have no knowledge.

Q Right.

A I assume that it might be possible.

Q At least it is possible that they didn't know about it?

A I don't know.

MR. GILLEAN: That's all the questions I have, Your Honor.

THE COURT: Any redirect?

MR. LASSITER: No redirect, Your Honor.

THE COURT: May Mr. Moore be excused?

MR. LASSITER: Yes, Your Honor, unless the Court has some questions for Mr. Moore.

THE COURT: You're excused with the thanks of the Court, Mr. Moore.

THE WITNESS: Thank you, Judge.

(Witness excused.)

MR. LASSITER: William Hill.

WILLIAM LLOYD HILL, PETITIONER HEREIN, SWORN.

DIRECT EXAMINATION

BY MR. LASSITER:

Q William, state your name, please.

A William Lloyd Hill.

Q And where do you presently reside?

A The Diagnostic Unit of the Arkansas Department of Corrections.

Q How long have you been there?

A At that Unit, about four years.

Q What class inmate are you?

A Class I-B.

Q Do you know when your earliest potential parole eligibility date is?

A Yes, sir, the actual release date will be in February of next year but I'll actually go up in November of this year.

Q Okay. Now you were charged in Arkansas in 1978 with first-degree murder and theft of property; is that correct?

A Yes, sir, that is correct.

Q Were you extradited to Arkansas from another state on these charges?

A Yes, sir, I was.

Q Okay. Now prior to this time had you had any other felony conviction?

A Yes, sir, I had.

Q And where was that?

A In the State of Florida.

Q And what was the charge?

A It originated -- originally there was three charges, and I'm not positive what the charges actually ended up being. It was a negotiated settlement just like this time, and I got a

year and a day from -- in prison.

Q Okay. Did you do that time?

A Yes, sir, I did.

Q Let me back up and get a little bit of your background. Where were you born?

A I was born in Uniontown, Pennsylvania.

Q Okay. And did you live with your parents growing up?

A No, sir, I did not.

Q And when did your family break up?

A I was about six years old.

Q Where did you go then?

A I lived the majority of my life until I entered the Marine Corps at age 17 in state institutions, foster homes and places like that.

Q Okay. And how long were you in the Marine Corps?

A Approximately two years.

Q What did you do in the Marine Corps?

A I was a missile technician.

Q Okay. Now when these charges were filed and you were extradited back to Arkansas, where were you held? Do you remember?

A I'm unclear about what you --

Q What jail?

A In the city jail part of the time and then in the Pulaski County jail.

Q All right. And after you got back to Arkansas, when did you first see an attorney?

A Well, the very first time I saw an attorney was the head of the public defenders who happened -- who was at the courtroom at the time that I went up for my hearing once I was brought back from Vermont. Okay. The first time that I saw a specific attorney assigned to represent me was in the jail, and I saw that attorney four times.

Q All right. Who did you meet with the first time at the jail?

A It was Mr. Patterson and I believe two other attorneys. I'm not positive they were attorneys, but there was two other people.

Q Do you remember what Mr. Patterson told you concerning your case at the time?

A Well, at that time we primarily discussed -- he wanted to know did I have any defense witnesses that I would like to have called and things like that. And I told him that Mr. Brown would be a good witness and that there were several people who were -- had direct knowledge of my having been attacked with the handgun that was used in the felony, and that it would be in my benefit if he could find those people from the bar.

Q Did he have a copy of the State's file with him the first time he visited with you? Do you recall?

A I'm really not positive. And if forced to give an answer, I'd have to say I don't think so.

Q Well, if -- yeah, if you're not positive that's all right.

Did he inquire as to whether or not you had any past convictions?

A Yes, sir, that was one of the -- right immediately after we first began discussing my case, that was one of the issues he asked me was had I ever done any time. I told him I had. I had done a year and a day in Florida, and he asked me what it had been for and I explained it to him, and he didn't seem to think that it was such a serious issue as far as going to trial because at that time we were looking for going to trial, and he said that he didn't think that the State would attempt to convict me as a multiple offender because of that conviction.

Q On his second visit what discussions did you have with him?

A I had asked him to bring -- to see if he could get ahold of the autopsy report because I thought it was important to show that the deceased had been taking pills and drinking, and that was the primary reason why he came back that time was to discuss that.

Then he told me that he had not been able to find any of the witnesses that I wanted.

MR. GILLEAN: Your Honor, I'm going to object on the

basis of hearsay with respect to what Mr. Patterson said, and I at least make the objection for the record. Mr. Patterson, of course, as has been stipulated to is not here and can't offer his own version of the discussions that took place, and I believe it's hearsay and it should be excluded on that basis.

MR. LASSITER: Your Honor, I don't think we're introducing this for the truth of the matter asserted. In other words, it's really not important as to what witness was out there or whatever, but simply to show the discussions which led up to this negotiated plea which came down, and so I think it comes in because we're not introducing it for the truth of the matter asserted in the statements here but just to show that these things were said and it led up to eventually a negotiated plea.

THE COURT: The objection is overruled.

BY MR. LASSITER:

Q Okay. Go ahead. This is -- by the way, do you know how much time passed between your first meeting and your second meeting with him?

A Not precisely. I can give you a guess.

Q Well, let's not guess. During the second conversation, did he have the State's file with him then? Do you know?

A Yes, sir, he had a very large file with him which included the autopsy report.

Q Okay. At that time during these discussions in the second visit, was there any mention of a plea offer from the State?
A We began to talk about that as an option, and the reason was because none of the witnesses that I needed for my case could be found. The only witness that was available was Mr. Brown, and Mr. Brown's testimony was that he didn't remember how he got --
Q Okay. Do you recall these early conversations concerning the possibility of a negotiated plea with Mr. Patterson? Do you recall what was specifically discussed?
A Yes, sir.
Q And tell me what was specifically discussed.
A I wanted to know what kind of time range I was looking at, and I wanted to know if I got one of those time ranges what amount of time I was looking at before I could become eligible for parole, and I wanted to know what kind of a parole system they had in this state. I'd only been in the state five days and really didn't know that much about it other than what other inmates had told me in the county jail.
Q Had you ever been in any kind of criminal trouble in Arkansas before?
A No, sir.
Q Was this the first time you'd been here? When you say --
A Yes, sir.
Q -- "for five days," that was the first five days you'd

been in Arkansas before the event?

A Yes, sir.

Q All right. And what did Mr. Patterson tell you? Can you recall?

A He told me that I was -- that the charge that I was facing -- well, originally the charge that I was facing was a higher one. It was dropped to first-degree murder, and he said under that I would have a chance of getting from five to fifty to life, and that unless they could find those witnesses that it was his professional opinion that I should take -- begin to seek a plea agreement with the prosecuting attorney. So that's what I told him to do.

Q Now in your third meeting with him, did you discuss any specifics concerning a negotiated plea? Had an offer been made?

A Yes, sir.

Q And tell me about your third meeting?

A Okay. He came and told me that the state was offering 45 years, 35 for the murder and ten to run consecutively for auto theft.

Q So the offer was for 45 years totally?

A Yes, sir, 45 altogether.

And I asked him how much time I would be forced to serve before I became eligible for parole on that kind of a sentence, and he told me about nine years. And I told him

that I couldn't see how that would be in my benefit to t
that sentence because it was my understanding that people were getting out from life sentences after only serving seven years, and he said that that was true.

Q Now let me back up to make sure the record is clear on that. Your understanding about that came from where?

A From other inmates originally. I didn't know any --

Q Other inmates in the jail where you were?

A Yes, sir.

Q And you discussed that with Mr. Patterson, correct?

A Yes, sir.

Q And what was his response again?

A Okay. When I told him about that he said that that was true, that it was, in fact, at that time not unheard of for people to get out in a seven-year period of time.

He also said, though, that we were talking about clemency versus just straight parole, and I told him that I still didn't see as how that made any difference. I wanted -- if I was going to have to do nine years to become eligible for parole, then I might as well take the chance on a jury trial. And he said that he was going to go back and talk to the State and see if he could get a different offer.

Q And did he get a different offer?

A Yes, sir, he did. He came back and said that the State was offering 35 years. And then I asked him again what the

parole eligibility would be under that, and he said, "Right at six years. If you go down there and keep your nose clean, you'll do six."

Q Now if you had known that once you got to Cummins your parole eligibility date was going to be out there at around nine years, would you have entered the plea?

A No, sir, I would not.

Q If Mr. Patterson had advised you that you would have to do around nine years before you could possibly be paroled, would you have entered the plea?

A No, sir, I wouldn't, and the reason was just because I at the time believed that I'd have just as good a chance on a life sentence of getting out before nine years.

Q The Joint Exhibit form -- pardon me. The Joint Exhibit plea statement which I referred to earlier, which is Joint Exhibit 1 --

MR. LASSITER: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

BY MR. LASSITER:

Q -- shows your signature on the bottom of it. Is that your signature?

A Yes, sir, it is.

Q And did Mr. Patterson sign it under you?

A Yes, sir, he did.

Q Okay. And did you put these checks up here, and is that -- are those your initials to the side?
A The initials I put on there. The checks, he asked me the questions and was filling them out.
Q Okay. Who filled out the information in the first two paragraphs?
A I don't know. It was already filled out when I came in the room.
Q Okay. Did Mr. Patterson ever discuss a piece of legislation called Act 93 with you?
A No, sir.
Q Did he ever discuss with you any kind of tiered system based on the number of prior felony offenses which lead to -- which affect parole eligibility? Did he ever discuss that with you?
A No, sir.
Q Did he ever tell you that your prior conviction would make any difference as to your earliest potential parole eligibility date?
A No, sir.
Q Do you remember when you found out that Mr. Patterson had died?
A The first time that I heard about it was when you were retained as my attorney.
Q And when was that approximately?

A In '82.
Q And at that time had you already filed your petition in Federal Court?
A Yes, sir, and I was about to lose it. That was the reason you were retained.
Q All right. Was this your first petition in Hill V. Lockhart?
A Yes, sir.
Q After you got down to Cummins did you try to contact Mr. Patterson --
A Yes, sir, I --
Q -- by letter?
A Yes, sir, I did. Actually, though, he wrote me first because I had had some questions as we were departing about whether or not I had told him enough time on the jail time, and I got a correspondence from him when I got there but before -- I think it was like within two weeks. And then I found out that -- the records office sent me this time card and it said that I was going to do nine years, and first I checked -- I wrote the records office back and told them that they'd made a mistake, and after they double-checked it and everything, then they wrote and informed me that, no, they hadn't made a mistake, that I was under Act 93, and as a result I'd have to do right at nine years before I became eligible for parole.

At that time, then I wrote to the Public Defender's Office, and tried to get ahold of Mr. Patterson. I never received any kind of answer from anyone.

MR. LASSITER: That's all I have on direct.

THE COURT: Mr. Gillean?

CROSS EXAMINATION

BY MR. GILLEAN:

Q Mr. Hill, you know that Mr. Patterson is not here today, can't tell us his version of what it is that he told you in this particular case, so all we've got is to question you about what happened and what you understood at the time, so I'd like to just go back, if I may, through some of this.

Now you've indicated that you made Mr. Patterson aware of your prior conviction from Florida. And at what meeting was that, that you informed him about that?

A Okay. The very first time that he --

Q The very first time.

A -- talked to me.

Q Okay. And you've also indicated that in discussing at the fourth meeting the 35-year offer that the State made, he indicated to you that you would be parole eligible in six years or approximately six years?

A Yes, sir, if I came down and kept my nose clean.

Q Did you all specifically discuss again at that meeting the prior conviction from Florida and what effect it might have on

your parole eligibility?

A No, sir, we did not specifically discuss that again. That issue only came up once, and that was --

Q At this first meeting?

A Yes, sir.

Q You've indicated to this Court that if you knew that you were going to have to serve nine years before becoming eligible for parole that you would not have pled guilty?

A That's correct.

Q And you would have insisted on going to trial and taking your chances with a jury trial?

A Yes, sir.

Q And why is that?

A Because at that time my understanding was that I had just as a good a chance of getting out after seven years from a life sentence as if I came down and then paroled a lesser sentence.

Q And who told you that?

A That had been many of the people in the county jail, and also when I spoke with Mr. Patterson, he indicated that, yes, that it was not unheard of, so I couldn't see any reason -- if I was going to have to serve nine years to become eligible for parole, I could see no reason why I shouldn't take a chance on the life sentence.

Q Did Mr. Patterson explain to you -- I believe you referred

to this earlier that if someone who received a life sentence and got out within seven years, that that involved maybe executive clemency?

A Yes, sir.

Q And do you understand what executive clemency is?

A Yes, sir.

Q Do you understand that there's no guarantee that anyone who receives a life sentence would receive executive clemency?

A Yes, sir.

Q You also understand that with parole eligibility, it's just that you become eligible for parole, let's say if you have to do a third of a 35-year sentence,in approximately six years but you're not guaranteed of being released on parole at that time. Did you understand that at the time?

A Yes, sir. I understood that it meant that I would be -- have the chance, have the opportunity of being released on parole.

Q And you thought that if you were going to be parole eligible in nine years that that wouldn't be better off than possibly having to apply for executive clemency under a life sentence? I mean, you in weighing that determined that that wouldn't be better, a better situation than a life sentence?

A No, sir, not at that time because of the fact that from every indication I got, everybody seemed to believe that that was not an uncommon thing. I asked just about every inmate

down there who I associated with, and all of them said it was -- it was pretty common.

Q And you don't remember Mr. Patterson discussing Act 93 or the statute that governed parole eligibility at all?

A No, sir, the first time I heard of Act 93 was from the records office. I couldn't even -- and then after that I tried to find it and couldn't even find it in the law books any more. It took a long time.

Q Now I take it in that you pled guilty to this offense, you're not disputing that you were guilty of the offense that you were charged with; is that a fair statement?

A (No audible response.)

Q And you acknowledged to the Court that you were guilty of the offenses that you were pleading guilty to, and you were pleading guilty because you were guilty?

MR. LASSITER: Your Honor, I do not think that he raises his Fifth Amendment -- or waives his Fifth Amendment privilege to not answer that by these proceedings. I think we're dealing with voluntariness based on advice of counsel, and I think he can validly waive his -- waives his Fifth Amendment privilege on that question.

MR. GILLEAN: My only intention is to get at the guilty plea proceedings themselves. I mean, I'm certainly not trying to solicit a confession from Mr. Hill. I'm only getting at that he ultimately did plead guilty back in 1979.

MR. LASSITER: Well, the answer to that is obviously yes.

THE COURT: I think Mr. Lassiter is right and the objection is sustained.

MR. GILLEAN: I think that's all the questions I have, Your Honor.

THE COURT: All right, Mr. Gillean.

REDIRECT EXAMINATION

BY MR. LASSITER:

Q William, what did you do when you found out that you were sentenced under Act 93 when you got down there?

A I tried first writing the Public Defender's Office, and didn't get any response. Then I went down and tried to find Act 93 in the law books and didn't know enough about it to find it.

Q What did they tell you at the records office when you talked to them about it?

A That it meant I was going to have to do a half and less good time.

Q Okay.

MR. LASSITER: That's all I have.

MR. GILLEAN: Nothing further, Your Honor.

THE COURT: All right. You may step down, Mr. Hill.

(Witness excused.)

MR. LASSITER: The petitioner rests, Your Honor.

THE COURT: All right.

PETITIONER RESTS

MR. GILLEAN: And, Your Honor, as I indicated earlier, respondent has no witnesses to call.

THE COURT: Very well, Mr. Gillean. Do I deem the matter submitted?

MR. LASSITER: Yes, Your Honor.

MR. GILLEAN: Yes, Your Honor.

THE COURT: Very well, I'll try to have you a decision as quickly as possible. If there's nothing further we stand in recess.

(Recess at 2:50 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Kay Quinn Sept 12, 1988